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No. 06-582

IN THE

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

JOAN LASKOWSKI, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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1. Today in *Hein v. Freedom from Religion Foundation, Inc.*, No. 06-157, the Court reversed the Seventh Circuit's judgment, holding that a federal taxpayer lacks standing to challenge ongoing Executive Branch use of general appropriations.

The Court's opinion, while it clarifies the scope of *Flast v. Cohen*, 392 U.S. 83 (1968), in the particular context of Executive Branch expenditures, does not resolve the issue presented by this Petition, whether a taxpayer may seek reimbursement from a *private entity* for *prior congressional* expenditures. In the Seventh Circuit, under this case, any federal taxpayer can mount a *post hoc* challenge to any congressional program on Establishment Clause grounds, in order to seek "restitution" from the grantee. Permitting taxpayers to sue private organizations, on behalf of the Government, for the Government's alleged past violations of the Constitution is an unwarranted and unwise expansion of taxpayer standing, which directly contradicts this Court's prior precedents. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105 (1998).

The jurisprudential and real-world effects of this case have national importance and should be addressed without further delay. As the Solicitor General argued to this Court in its brief in this case, the Seventh Circuit's opinion is an "extraordinary ruling" that "clearly disregards this Court's taxpayer-standing precedents and departs from established principles of judicial restraint in constitutional cases" and that "is likely to have a substantial chilling effect on the willingness of private [religious] organizations to participate as providers of secular government services pursuant to federal grants or contracts." Fed. Resp. Br. at 6, 17. The Solicitor General, however, suggested that certiorari need not be granted immediately, since it was possible that the Court's resolution of *Hein* might "provide guidance" or "obviate the need for this Court's plenary review." *Id.* at 18.

In fact, however, *Hein* did not resolve the issue presented here, so there is no longer any reason to wait. Specifically, the plurality found no standing "[b]ecause the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment . . . ." Slip op. at 18 (plurality op. of Alito, J.). *See also* slip op. at 12 (Scalia, J., concurring in the judgment). That holding does not encompass this case because the challenge here *is* "directed at an exercise of congressional power," slip op. at 18 (plurality op. of Alito, J.), rather than an unfettered Executive Branch decision. *See* Pet. at 4. Delay in resolving the precise issue here would also be harmful because, as Petitioner and the amici have noted in prior briefing, taxpayers are already seeking to use the Seventh Circuit's opinion to force private charities to "repay" millions of dollars for alleged prior Establishment Clause violations committed by the Government. *See* Pet. at 28; Reply Br. at 6; Br. for The Thomas More Law Center as *Amicus Curiae* Supporting Petitioner at 4.

2. As Justice Scalia noted in his opinion concurring in the judgment, moreover, *Flast* itself cannot be reconciled with this Court's modern standing principles. *See* slip op. at 16-21 (Scalia, J., concurring in the judgment). The doctrine, as it currently exists, in Judge Easterbrook's words with reference to this case and *Freedom from Religion Foundation*, is simply "arbitrary" and "illogical." *Freedom from Religion Foundation*, 447 F.3d 988, 989 (7th Cir. 2006) (order denying rehearing en banc) (Easterbrook, J., concurring). This Petition provides a good vehicle for the Court to re-examine the constitutional underpinnings of *Flast* and to provide a sound mooring for its taxpayer standing doctrine in the Establishment Clause context—an opportunity that at least two Justices suggested is welcome. Specifically, the second question presented in the petition here asks that *Flast* be overturned if it supports the result below.

For the reasons more fully stated in Petitioner's Petition and Reply Brief, this Court should grant certiorari.

Respectfully submitted,

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